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## Where Does the Buck Stop with the Backstop? The Irish-UK Border in Brexit Negotiations: June 2016-January 2019

**Abstract:** The abject failure of British Prime Minister Theresa May to get the United Kingdom's (UK) Withdrawal Agreement from the European Union (EU) through Parliament on 15 January 2019, with MPs overwhelmingly rejecting it by 432 votes to 202, has been put down to a variety of reasons. Primary among them has been the question of the post-Brexit status of the land border between the Republic of Ireland and the UK's province of Northern Ireland. Although an issue which was initially seen as of minor importance, the significance of the Irish border steadily grew over time until it became the main stumbling block in UK-EU Brexit negotiations brought about by the decision of the British people to leave the EU in a referendum held on 23 June 2016. Indeed, the key term of the ensuing debate, namely 'the Irish backstop', produced such confusion among politicians, political pundits and the general public that the House of Commons, split between so-called Brexiteers and Remainers, decided to reject May's deal out of hand. This article seeks to argue that, from June 2016 (the time of the referendum) up to January 2019 (the time of the first vote on May's Brexit deal in Parliament), the issue of the Irish backstop was seriously underestimated before suddenly taking centre stage and ultimately sabotaging the Withdrawal Agreement from within.

**Keywords:** *Brexit, United Kingdom, Northern Ireland, Republic of Ireland, European Union, negotiations, border, backstop*

backstop, /'bʌkstɒp/, n., 1. A thing placed at the rear of something as a barrier or support. 2. An emergency precaution or last resort.

(Oxford English Dictionary)

## **Introduction**

The result of the 2016 Brexit referendum calling for Britain to leave the European Union seems to require the UK to leave the EU's customs union and single market. Consequently, this presented the possibility that the two separate jurisdictions on the island of Ireland could end up in different customs and regulatory regimes, with the Republic of Ireland's common border with Northern Ireland now considered an external EU border (Gordon, 2017, p. 5). Although neither Ireland nor Britain wants a 'hard border', namely one at which products are checked at border crossings, the apparent aims of Brexit made achieving this seem difficult if not insurmountable. As de Mars et al. point out, Northern Ireland 'is one of the most challenging aspects of Brexit' because societal attitudes towards both the UK and EU 'have been shaped by different concerns from those at work in Scotland, Wales and England' while key Brexit issues 'such as the control of borders, citizenship rights, freedom of movement and access to foreign markets, have distinct resonances and impacts within Northern Ireland' (De Mars et al., 2018, p. 7).

The backstop mechanism, designed to prevent a hard border on the island of Ireland in the event that the UK leaves the EU without securing a comprehensive trade deal by 2020, has been variously defined as a position of last resort (Campbell, 2018), an insurance policy, or a rainy-day backup plan (Hain and Murphy, 2019). As, at the time of the referendum, the UK and Ireland were part of the EU single market and customs union, goods and services moved between Ireland's two jurisdictions with few restrictions, if any. Moreover, in light of the 1998 Belfast or 'Good Friday' Agreement (GFA) which ended decades of political violence in Northern Ireland, maintaining a frictionless border was considered vital for the political stability of the entire island of Ireland (Murphy, 2018, pp. 30–31). Indeed, Mary C. Murphy maintains that Brexit 'threatens not only Northern Ireland's economic future but also its political, social and constitutional stability' (Murphy, 2018, p. 96). In 2018, the Republic of Ireland was Northern Ireland's largest external trading partner by far, accounting for around 30 per cent of its trade in goods. No other UK region has trade relationship of a similar nature with any other country in the world (Romei, 2017). The EU tried to maintain that the border conundrum could only be resolved by forcing Prime Minister Theresa May to abandon her 'red lines', namely no customs union, no single market, no European court of justice and, most importantly for Ireland, no hard border. In November 2018, the EU's chief Brexit negotiator, Michel Barnier, drew up a Withdrawal Agreement text, which proposed a 'common regulatory area' (CRA) across Ireland if other solutions to avoid a hard border failed. This would create a customs border in the Irish Sea unless May agreed to alignment across the UK – effectively keeping the entire UK in the EU customs union and single market indefinitely, a move which she ruled out categorically. Thus, what became known as 'the Irish backstop' led to the United Kingdom experiencing its greatest political and constitutional crisis in living memory.

## Objectives

This article seeks to argue that, from the time of the Brexit referendum in June 2016 up to the time the UK-EU Withdrawal Agreement was first voted down in Parliament in January 2019, the issue of the Irish backstop was seriously underestimated by both negotiators and political commentators up to mid-2017. Moreover, once it had come to dominate events, it became apparent that ‘the Irish backstop’ had the potential to entirely undermine the Withdrawal Agreement which was to provide the legal and political basis for Britain’s future relationship with the European Union.

Given that Brexit quickly became a ‘work in progress’ in which the situation and issues could change rapidly within weeks, days or even hours, it was decided to focus on one of the few constant factors in the entire debate, namely the backstop mechanism contained within a protocol to the Withdrawal Agreement. Moreover, the ever-changing situation concerning Brexit initially made it extremely difficult to analyze developments at a distance from an academic point of view. As the issues only finally crystallized in the run-up to the first parliamentary vote on Theresa May’s deal in January 2019, it was decided that this was the first moment allowing one to take stock of events, or at least provided a moment of calm in the eye of the storm. This became truer once a subsequent amendment calling for the replacement of the backstop with ‘alternative arrangements’ passed through Parliament, thus providing the British prime minister with a mandate to approach Brussels for further concessions on the Irish border issue.

Therefore, the aim of this article is to provide some clarity on an issue which, although central to discussions on Brexit, has been a source of utter confusion not only for the general public but for journalists, politicians and academics. It uses a large number of sources in the British and Irish media representing a variety of positions on Brexit from across the political spectrum, as well as the key primary source documents drawn up at various crucial stages of UK-EU negotiations. It also aims to provide a critique of the political and diplomatic strategies of the parties involved who, despite declaring, in over two years of negotiations, their desire to avoid a no-deal Brexit, ended up, by underestimating the significance of the backstop, making it more, not less likely.

## The Background to the Backstop

Northern Ireland is the smallest constituent territory of the United Kingdom with a population of 1.8m people, a mere 2.9% of the total UK population. Although the UK voted by 17,410,742 votes (51.9%) to 16,141,241 (48.1%) to leave the European Union (EU) in June 2016, Northern Ireland voted to remain by 440,707 votes (55.8%) to 349,442 (44.2%) (*EU referendum results*). In percentage terms, this amounted to 0.2 per cent of the total UK Leave vote and 0.3 per cent of the Remain vote.

While Northern Ireland has a degree of autonomy through a power-sharing Assembly and Executive, all formal powers regarding Brexit reside in the Westminster Parliament, to which a total of 18 MPs from Northern Ireland have been elected. It has no autonomy over Brexit, thus making its vote to remain within the EU of no constitutional significance. Moreover, the UK Supreme Court has stated unequivocally that the assent of Northern Ireland would not be required for the UK government to exit the EU (Gordon, 2017, p. 7). Undeniably, the repeal of an enormous amount of EU law would have a serious impact upon Northern Ireland's domestic legislation, for which consent is only required in those aspects in which its Assembly has devolved powers in that area and desires to repeal or amend. However, in January 2017, just six months after the Brexit vote, the Assembly and executive collapsed as the result of a domestic financial scandal, thereby reverting direct governance of the province to Westminster. As we will see, this placed Northern Ireland in a very weak position in constitutional terms in shaping Brexit, and removed the option of decisions regarding the backstop being devolved to the Northern Ireland legislature, thus allowing it to become a direct source of conflict between London and Brussels and gain an international significance it probably never deserved. Moreover, the weakness of Northern Ireland's position caused apprehension in Dublin that the legal, political and economic frameworks already in place were not sufficiently strong to withstand the consequences of Brexit.

Thus, with the possibility of the introduction of a 'hard border' with the Republic of Ireland, comprising customs controls and immigration checks, Northern Ireland is the part of the UK most noticeably impacted by Brexit. Since 1922, a Common Travel Area (CTA), with no immigration controls, has existed between Northern Ireland and the Irish Free State, later the Republic of Ireland (Daly, pp. 4–5; Gordon, 2017, pp. 2–3). As members of the EU, however, both the UK and Ireland chose to remain outside the Schengen Agreement and maintain border controls for the citizens of other EU states arriving in their respective countries. In 2016, there was still a significant degree of cross-border employment with up to 30,000 workers living and working on different sides of the border and for whom border checks would be very inconvenient should Brexit occur (*House of Lords European Union Committee ...*). On the other hand, if the border remained open, there were fears that EU immigrants could enter the UK across the border unnoticed.

Although there has virtually always been freedom of movement of people across the Irish border, customs controls on goods were in operation until 1992, when the Single European Market came into force (Murphy, 2018, pp. 29–30). The fear due to Brexit is that the imposition of tariffs and return of customs controls for goods travelling to and from Northern Ireland could return, along with an increase in smuggling, if a customs union is not negotiated with the EU, a move that would have to be approved by the EU Member States (Hewson and Morgan, 2017, pp. 45–46). Many have looked to current practices concerning the movement of goods across the borders of France-Switzerland and Norway-Sweden as examples of possible models for the post-Brexit Irish border (Tonge, 2017, p. 9). However, others have warned that the historic legacy and political sensitivities surrounding the border

between Northern Ireland and the Republic of Ireland preclude such models being simply transposed to this situation (Durrant and Stojanovic, 2018, p. 5; Hewson and Morgan, 2017, p. 39).

In addition, Article 2 of Protocol No.20 of the Lisbon Treaty confirms that both the UK and Ireland ‘may continue to make arrangements between themselves relating to the movement of persons between their territories’ (*Consolidated version of the treaty ...*). However, a post-Brexit world may see the Irish government having to request permission from the EU to keep the CTA, giving the possibility, however remote, that another EU state could challenge the current arrangement. Moreover, a bilateral tailor-made deal between London and Dublin to maintain the customs union between the two states, thereby avoiding a hard border, would also require EU approval (Gordon, 2017, p. 4). Another alternative proposed in early 2017 was that Northern Ireland would become a member of the European Economic Area (EEA), which, although ensuring continued access to the single market, would not solve the outstanding political issues (Doherty et al., 2017).

Trade issues and avoiding tariffs are of crucial importance to the Republic of Ireland with 34% of its exports of goods and services going to the EU in 2016, almost half of which were destined for Britain. Indeed, no other EU country relies so heavily on British trade (*Ireland post-Brexit ...*). However, with Northern Ireland depending on the EU as its largest export market, with trade amounting to £3.63bn in 2014, Brexit would affect it even more than the Irish Republic or mainland Britain. However, as part of the UK’s overall trade, Northern Ireland only provides 2.4% of UK exports and 1.5% of imports. Moreover, with 34% of its EU exports heading there, the Republic of Ireland constitutes the largest market for Northern Ireland’s exporters (Tonge, 2017, p. 9).

In addition, a hard border in Northern Ireland after Brexit would affect more than 7,300 companies that export to the Irish Republic, or roughly 15 per cent of the businesses in the region. According to the *Financial Times*, this would also have an impact on some 177,000 lorries and some 250,000 vans that cross the border for trade every month, and especially on Northern Ireland’s small and micro-companies with more than 90% of the businesses trading with the Irish Republic having fewer than 50 employees. Northern Ireland is also the second poorest region in the UK after Wales, with a GDP per capita 27 per cent lower than the UK average, and 57 per cent less than that of London. The region also has the second lowest productivity levels in the UK and relies more on agriculture than the rest of the UK (Romei, 2017).

Of equal importance are the political sensitivities surrounding Brexit for Northern Ireland (Murphy, 2018, p. 27). Although this would necessitate references to the EU within the GFA being deleted, the all-island aspects of the agreement will continue to entangle Brussels in supporting the institutional mechanisms for its financing of the Northern Ireland peace process (Gordon, 2017, pp. 4–6). As the GFA is an international treaty, endorsed by referendums on both sides of the border, there seems to be no room for a legal challenge should it require redrafting. Divisions over Brexit were also reflected in the traditional divi-

sions in Northern Ireland's society. Thus, a large majority of nationalists, who see themselves as Irish and European citizens and have the legal right to be so, voted to remain in the EU. On the other hand, approximately two-thirds of unionists voted to leave (Tonge, 2017, p. 4; Murphy, 2018, p. 31).

## **Defining the Backstop**

The most problematic issue with defining the Irish backstop is that, having seemingly reached agreement on the issue in December 2017, both the EU and the UK came away with significantly differing views of what it meant. The EU originally proposed a backstop that would result in Northern Ireland staying in the EU customs union and single market, meaning that the customs and regulatory border between the UK and the EU would essentially be drawn down the middle of the Irish Sea (Murphy, 2018, p. 32). Thus, goods coming into Northern Ireland from other parts of the UK would have to be checked to make sure they were in accordance with EU standards. Moreover, as it seems that the EU position was not to agree to a transitional period and substantive trade talks until a backstop was in place, it was seen as a way of providing a kind of safety net should a broader UK-EU deal not be reached by 2020.

Despite the continuous insistence of Michel Barnier that the backstop could only apply to Northern Ireland, May was to continually and stridently reject any separate status for this province from the rest of the UK, seeing this as a grave threat to the constitutional integrity of the union. Indeed, as we will see, she subsequently proposed that the backstop should include the whole of the UK, thereby allowing it to remain aligned with the EU customs union for a limited time after 2020. In a context where the reintroduction of a hard border had virtually no support in Northern Ireland (or the Republic of Ireland), it was, paradoxically, to become the one issue which has united a deeply divided society, one which has been gradually healing over 20 years of peace (Murphy, 2018, pp. 27–30). Moreover, the fear existed in some quarters that not only did Brexit threaten to derail the Northern Ireland peace process but would encourage Scottish nationalists to demand similar terms should Northern Ireland alone be allowed to stay in the customs union and the single market, thereby undermining the UK's constitutional integrity (Doyle and Connolly, 2017, p. 6; Watson, 2018; Carrell, 2019). Indeed, following a close-run Scottish independence referendum in 2014 and the fact that 62% of voters Scotland had subsequently voted to stay in the EU, such concerns were not just political posturing but genuine fears. This was especially true once claims were made by prominent politicians and commentators that Scotland was being dragged out of the EU against its will, along with calls not only for a second independence referendum, but even secession from the United Kingdom (Skoutaris, 2017). Indeed, as Adrian Guelke has pointed out, a precedent was set in 1985 when Greenland, an autonomous Danish territory, was allowed to leave the EEC while Denmark remained. This presented the possibility, albeit a theoretical one, of remain-voting Scotland, Northern Ireland and Gibraltar remaining

within the EU while leave-voting England and Wales effected their departure (Guelke, 2017, p. 50).

By this stage, however, the British prime minister was facing a perfect storm largely of her own making. In July 2016, Theresa May, despite her personal opposition to Brexit, had replaced David Cameron as Conservative leader within weeks of the Brexit vote and had inherited a working majority of 17 votes in the House of Commons. Hoping to increase this majority and thereby strengthen her negotiating position with the EU, in April 2017, when Ireland's role in the Brexit debate was still considered a side-show, she made the ill-fated and hasty decision to call a snap general election to take place that June (Boyle and Maidment, 2017). Believing erroneous opinion polls showing a 20-point lead for the Conservatives over the Labor Party, May's decision turned out to be entirely counterproductive for a multitude of reasons (Birrell, 2017). Firstly, the prime minister not only failed to increase her parliamentary majority but actually lost it, ending up with 13 seats fewer than the number won the previous election, thus achieving the opposite of what she had intended (*Theresa May 'shed a tear' ...*). To make matters worse, the Labour Party, under Jeremy Corbyn, increased its presence in the House of Commons by 30 seats (*General Election 2017 ...*). Faced with no choice but to form a minority government, May entered into a confidence-and-supply arrangement<sup>1</sup> with the Democratic Unionist Party (DUP), a hard-line Brexit-supporting Unionist party in Northern Ireland (*Conservatives agree pact with DUP ...*). Little did the prime minister realize that, as the Irish backstop came to the fore, within months her government would become a hostage to the demands of the DUP over Brexit and the backstop in particular (L. Hughes, 2017). Thus, from then on May could not allow her position or public statements to appear soft on the issue of the Irish border, portraying the backstop as a constitutional threat to the territorial integrity of the United Kingdom.

## The Birth of the Backstop

The Irish backstop first appeared on 8 November 2017 as an innocuous-sounding 66-word bullet point, one of six at the bottom of a 'working paper' which Michel Barnier's team had circulated to officials from the EU's 27 member states. It read as follows:

*It consequently seems essential for the UK to commit to ensuring that a hard border on the island of Ireland is avoided, including by ensuring no emergence of regulatory divergence from those rules of the internal market and the Customs Union which are (or may be in the future) necessary for meaningful North-South cooperation, the all-island economy and the protection of the Good Friday Agreement.*

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<sup>1</sup> A confidence-and-supply arrangement is one where a party agrees to support a minority government on votes of no confidence and finance (supply) bills while being free to vote its own way regarding legislative bills.

As Irish journalist Tony Connelly describes, this paragraph ‘was the infant that would grow into the single most intractable source of conflict in the negotiations’ (Connolly, 2018). At the time, however, as most of those involved in Brexit were focused on citizens’ rights and drawing up a withdrawal agreement, the Irish border was considered merely a sideshow. Suddenly, however, Ireland was to find itself center stage of an issue which was to determine the course of Brexit, thereby progressively drawing greater hostility from Brexiteers as it grew in importance. Indeed, writing in *The Spectator* almost a year later, James Forsyth, pointed out that ‘To the astonishment of many, the Irish border has become the defining issue of Brexit. There is now a serious and growing risk that the issue will lead to the UK and the EU failing to reach a withdrawal agreement – with all the dire consequences that would entail’ (Forsyth, 2018).

By autumn 2018, the confusion and concern had intensified. Although Barnier dismissed May’s plan for a limited-period backstop including the whole of the UK, as the issue of regulatory alignment had not been addressed, he appeared not to rule out some kind of long-term UK-EU customs relationship, claiming that he now wished to ‘de-dramatize’ the Irish border as an issue in the talks. However, Leo Varadkar, Ireland’s *Taoiseach* or prime minister, then intervened arguing against a time limit being placed on the backstop, a position which further entrenched the hard-core Brexiteer view that an indefinite backstop would allow the EU to greatly restrict Britain’s trade for the foreseeable future.

It was not only the Irish government which now started to become nervous over the negotiating parties’ less clear stance regarding what had been portrayed as a ‘bullet proof’ or ‘all-weather’ backstop, one in which Brussels and Westminster had seemingly guaranteed Ireland that there would be no significant changes at the border regardless of what shape Brexit took. For some Irish commentators, Barnier’s talk of de-dramatizing began to sound very much like de-prioritizing. Apart from reports that the original backstop was now being redrafted, more worryingly, some EU members were suggesting a *quid pro quo* in exchange for supporting the Irish government’s demand for the *status quo*, namely forcing concessions regarding Ireland’s low corporation tax for its much-valued tech giants such as Apple and Google, a sector of the Irish economy which Brussels and Paris had long attempted to draw to the core countries of the EU. Indeed, Brexit would mean the loss of Ireland’s primary ally, namely the UK, in resisting EU ‘tax harmonization’ (Murphy, 2018, p. 36). Reassurances from senior Irish politicians that there was nothing to be alarmed about and that EU support for Ireland was solid as ever, began to sound horribly similar to the reassurances of EU ‘solidarity’ which Ireland had heard following the banking crisis of 2008 before being forced to accept a financial bailout on harsh terms (O’Donovan, 2018).

How had it come to this? To answer this question, one must examine the negotiations which had taken place the previous year. Despite Britain, Ireland and the EU seeming to be on the same page concerning their determination not to have a hard border, confusion had reigned in negotiations throughout the summer of 2017. The outstanding issue was the politics and methodology regarding how this was to be achieved. Britain hoped to



avoid this by establishing a very close economic relationship with the EU in the future after Brexit, basing its position on multiple technical fixes and the future relationship to sort out the border. A more skeptical Ireland and the EU wanted the British to agree to written ‘principles’ and ‘commitments’ before Brexit and thus have a solution locked into the Withdrawal Agreement. Therefore, both sides ended up talking at cross-purposes. This led to dismay in London when the now-notorious backstop in Barnier’s working paper was unveiled on 8 November 2017.

In fact, months before the backstop had come into existence, warnings had been issued regarding Ireland’s strategy of trusting the EU to fight its corner. For instance, in April 2017 former Irish diplomat, Ray Bassett, stated that, in his view, Ireland’s relationship with the UK was more important than its membership of the EU and that Brussels’ apparent desire to ‘punish’ the UK for leaving, would end up with Ireland itself being punished. Thus, the Irish government should, in his view, negotiate a bilateral deal with Britain over the Irish border issue. Failing that, he suggested the Irish people should wake up to the possibility that continued EU membership was no longer in Ireland’s interests (Leahy, 2017). Nevertheless, under Leo Varadkar, Ireland was to adopt an increasingly hard-line position leading to the development of tensions with the British government and undermining what had become a close and friendly relationship between the two countries following centuries of strife (Murphy, 2018, pp. 28–29).

The clearest example of the confused course of the negotiations that summer were position papers on Northern Ireland issued on 16 August 2017 in which the British called for as frictionless a border ‘as soon as possible’, one which was to be enabled by technical solutions, such as streamlining customs arrangements and ‘trusted trader’ schemes. Moreover, this could only take place within a ‘new, deep and special partnership that the UK wishes to build with the EU’, as well as recommending a customs partnership in order to maintain the status quo regarding the movement of goods between them. In addition, the British government maintained that any agreement had to be based on recognizing ‘the crucial importance of avoiding a return to a hard border for the peace process in Northern Ireland ... [and] the unique nature of the land border, in particular: its history and geography’, as well as respecting ‘the provisions of the Belfast (‘Good Friday’) Agreement in all its parts’ (*Northern Ireland and Ireland, Position Paper ... 2017*, pp. 14–15). However, not only was Britain basing its position on its future relationship with the EU and the building of infrastructure to serve the technological solutions being proposed, it was also attempting to have the backstop broadened out to include all of the UK, not just Northern Ireland. Soon dismissed by senior EU officials as ‘unicorns’ and ‘magical thinking’, it raised suspicions that Britain was using the Irish question as a Trojan horse in order to secure a favorable trade deal at some point in the future (Emerson, 2019). In its official response on 6 September, Brussels rejected Britain’s proposed strategy based on a number of technical fixes, instead demanding an over-arching solution and unequivocally placing the onus on the United Kingdom to do so. As frustration increased following the passing of a deadline in October

2017 in order to move to the second phase of negotiations, it became clear that the British had been led to believe that the once the major political commitments had been made in phase one, the detail would follow in phase two. However, Dublin and Brussels were insisting that phase one contain both. The Irish government and EU member states were now concerned at the lack of progress, especially London's perceived desire to sign up to principles while not acting on them (Connolly, 2018).

In hindsight, it now seems that there was a continual dichotomy between the positions of the British and Irish governments over how to achieve a soft border in Ireland, an oversight which led to the backstop taking center stage. On the one hand, Britain was planning achieve this by having a very close economic relationship to the EU in the future. A mistrustful Ireland, however, wanted to lock a solution into the actual upcoming Withdrawal Agreement and to use the EU to force Britain to do so. The result was that both sides ended up talking past each other and leaving negotiations with the impression that they were closer to bringing the opposing side around to their own point of view, rather than finding a compromise. Thus, there was shock and horror in when the significance of bullet point number six became apparent on 8 November. Despite the obscure language in which it was couched, it was clear that the maintenance of a soft border, north-south cooperation and the all-island economy would depend on Northern Ireland remaining in both the customs union and, for its goods but not services, the single market.

However, according to Tony Connelly, British officials were told by their EU counterparts even at this stage that the Northern Ireland backstop would not be treated as a requirement for passing the 'sufficient progress' threshold, a position with which both the Irish negotiators and Barnier's Task Force agreed in off-the-record briefings. In July 2017, however, the Task Force had acceded to Dublin's request to ask the British government to conduct a 'mapping exercise' regarding the border by which London assessed that there were 142 areas of north-south cooperation resulting from the GFA, including the environment, health, agriculture, transport, education/higher education, tourism, energy, telecommunications, broadcasting, inland fisheries, justice and security, and sport. Once British and Irish negotiating teams in Brussels that autumn had examined this long list to see which depended on, or where facilitated by common EU membership, the Task Force concluded that Brexit would cause disruption to cross-border cooperation, either explicitly or implicitly. Rejecting the British viewpoint that this could be avoided by a large number of small bilateral agreements, Barnier's Task Force considered that a broad over-arching solution was required. Moreover, when it came to the question of how sufficient progress was to be assessed, the Task Force took the position that this would depend on achieving 'no regulatory divergence' and 'full regulatory alignment' between the two parts of Ireland, namely what was to become known as 'the backstop' (Connolly, 2018).

Unfortunately, Theresa May was already caught up in a domestic political context in which she was attempting to placate backbench Conservative MPs over the amount of money Brexit would cost the British exchequer. Thus, when the Northern Ireland backstop

did appear in November 2017, it was seen as an unforgivable EU attempt to violate the territorial integrity of the United Kingdom. Indeed, even May's own Brexit minister, David Davis, was driven to condemn it publicly: 'We recognize the need for specific solutions for the unique circumstances of Northern Ireland,' he said, 'but it cannot amount to creating a new border inside the UK' (Rogers, 2017). *The Times* reported the new development thus:

*The European Union is pressing the government to give Northern Ireland 'Hong Kong-style' autonomy after Brexit. The move would bestow on the nation a status distinct from the rest of Britain as a World Trade Organization member in its own right. The plan, supported by Dublin, envisages Northern Ireland being granted a legal status separate from its current position as part of the United Kingdom so that European regulations and the EU customs union could continue to apply. Diplomatic sources have confirmed that the EU is studying the examples of Hong Kong and Macau, both part of China but also individual members of the WTO and operating different customs and trade regimes (Waterfield, Coyne & Wright, 2017).*

### **The Joint Report of December 2017: The Backstop takes Centre Stage**

By late autumn 2017, feelings were also running high in Dublin where the Irish government's position was that London should have seen the backstop coming since Northern Ireland's constitutional status had been settled by the GFA. This led to a tempestuous meeting in Brussels on 15 November attended by Barnier's Task Force and Irish officials on one side and British government representatives on the other. As an indicator of just how much the parties involved had been talking at cross-purposes all along, both sides were infuriated at each other's view of the backstop bullet point. London's position was that the Irish border had to be sorted out in a future trade deal and felt that the issue was beginning to threaten Theresa May's vision of a post-Brexit Britain which would make a smooth and clean break with the EU, thus allowing it conduct trade deals of its own all over the globe. Dublin, however, believed that if the status of the Irish border was not solved now, the British would use it merely as a bargaining chip to extract a frictionless trade deal with the EU. However, British cabinet ministers were mystified why the Irish government thought that London could ever impose a hard border, with one telling *The Independent*: 'It's impossible to put a border in place between Northern Ireland and the Republic ... You cannot put up enough fences. It was the same in the 70s – we could never stop terrorists coming across it. Even if there is no deal, I can see no reason why we would try to enforce the border' (Watts, 2019).

With communicating his concerns in mind, on 17 November, Varadkar had a frosty meeting with Theresa May at an EU social summit in Gothenburg where he dismissed British reassurances claiming that there would be no hard border on the island of Ireland: 'We've been given assurances that there will be no hard border in Ireland, that there won't be any physical infrastructure, that we won't go back to the borders of the past,' he said. 'We

want that written down in practical terms in the conclusions of phase one.' Moreover, he went so far as to suggest that Ireland would block any progress to negotiations about the future relationship with the EU unless the UK was prepared to take a hard border between Northern Ireland and the Republic, in any form, off the table: 'Britain, having unilaterally taken the customs union and single market off the table, before we move to phase two talks on trade we want taken off the table any suggestion that there will be a physical border, a hard border, new barriers to trade on the island of Ireland' (Elgot, 2017). Although British officials seemed not to realize it at the time, Vardakar's demands concerning the backstop amounted to an Irish veto to Brexit, especially once this became the official position of the EU as a whole.

Suddenly the Irish government was wielding influence regarding the future of Brexit that no-one had ever contemplated. Indeed, Irish journalist Fintan O'Toole claimed that it had ended:

*the illusions of all but the most deluded fanatics about Britain's real position in the Brexit process. It is not in a position to make demands ... they might now ask themselves: if, for the first time in 800 years, Ireland is proving to be in a much stronger political position than Britain, what does that say about what Brexit is doing to Britain's strength? It is being forced to accept what it claimed to be unacceptable, not because Ireland has suddenly become a global superpower but because it has the unflinching support of EU member states, the European parliament, and the EU negotiating team (O'Toole, 2017).*

While it was expected that Britain's right-wing press would react violently to its small former colony suddenly seeming to gain power over its future, even readers of *The Guardian*, not known for their jingoistic or Little Englander views, bristled at what they perceived as Irish hubris:

*It is understandable that Fintan O'Toole should make the most of his country's 15 minutes of fame but he will soon find that, when push comes to shove, the EU will treat Ireland with the same contempt as they did Greece. It wasn't that long ago that the people of Ireland had to endure severe austerity imposed upon them by the EU following the 2008 financial collapse. So far the Republic and its Taoiseach have been allowed to wallow in self-importance because it suited Brussels, but should that become a real threat to moving to the next stage of negotiating trade, something that's as important to the EU as it is to the UK, the Taoiseach will soon be pushed aside and, like Alexis Tsipras, do as he is told in the traditional way that the EU treats its smaller member states (Ibrahim, 2017).*

Nevertheless, the pressure was on Britain, not Ireland, to make a deal once EU Commission President Jean-Claude Juncker had set 4 December as the deadline of producing a Joint Report. On 30 November, an Irish-EU position paper was put on the table in which Dublin

kept up its demand that there be no regulatory divergence between Northern Ireland and the Republic of Ireland. However, as Tony Connelly reports, behind the scenes Irish officials, while still including the backstop, claimed to have couched the language of the text in such a way as to provide for the possibility of a future trade agreement and technological solutions helping to avoid a hard border, thus in line with what London wanted. Although it claimed to be giving the British the benefit of the doubt, once it had secured a legally binding backstop in the text, Dublin could afford the luxury of paying lip-service to what were merely the political aspirations of the United Kingdom. The next rocky few days of negotiations were, therefore, focused on finding a formula of words acceptable to both sides or, to put it more bluntly, a fudge (Connolly, 2018).

Having underestimated the significance of the backstop, both sides seemed to be talking at cross purposes yet again with each calling for the other to back down on their respective position in order to avoid a hard border. For example, in November 2017, the EU's Policy Department for Citizens' Rights and Constitutional Affairs published a study it had commissioned from two Belfast academics calling for 'flexible and imaginative solutions' from London and Brussels in order to maintain the GFA and avoid a hard border, warning however that: 'If the UK government persists with its intention to leave the single market, the customs union and the jurisdiction of the Court of Justice of the EU (CJEU), the challenge will be considerable' (Phinnemore and Hayward, 2017, p. 13).

With May refusing to accept the concept of 'no regulatory divergence', the deadlock was seemingly broken on 3 December when this was recast in the positive terms of 'maintaining alignment'. However, the deal collapsed once this wording was leaked to the DUP, the Northern Irish party whose support was essential for the Conservative government's survival (Murphy, 2018, p. 33). It took several more days for the linguistic niceties to gain the acceptance of all involved. Although 'maintaining continued alignment' remained in the Joint Report of 8 December, the DUP were placated with promises of 'no new regulatory barriers ... between Northern Ireland and the UK' and a guarantee 'to ensure the same unfettered access for Northern Ireland's business to the whole of the United Kingdom internal market' (*Joint report ...*).

If the Irish proverb 'there's many a slip between the cup and the lip' ever needed proving, what unfolded over the next two months would suffice. The 'constructive ambiguities' which had helped broker the deal now became the problem. Firstly, there was Paragraph 49 which stated:

*The United Kingdom remains committed to protecting North-South cooperation and to its guarantee of avoiding a hard border. Any future arrangements must be compatible with these overarching requirements. The United Kingdom's intention is to achieve these objectives through the overall EU-UK relationship. Should this not be possible, the United Kingdom will propose specific solutions to address the unique circumstances of the island of Ireland. In the absence of agreed solutions, the United Kingdom will maintain full*

*alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement (ibid.).*

While Dublin viewed the references to ‘future arrangements’ and ‘specific solutions’ as concessions that would help the British Prime Minister placate those in her party who wanted a future trade deal and opposed the backstop, London made its own interpretation of maintaining ‘full alignment’ to include all of the United Kingdom if needs be. Thus, the *Joint Report* had placed the Irish border question at the center, an issue which would bedevil the process from then on. May created further problems by the inscrutable manner in which she sold it to her ministers, some gaining the impression that it was just a formula of words, not to be taken too seriously, while the EU viewed it as a serious legal document. Matters were not helped by David Davis adding to the confusion, by saying that it was not legally binding, thus causing annoyance in Brussels. May’s negligence in never directly explaining to MPs that this was the way things were heading and having unwisely allowed the EU side to draft the Joint Report into a legal text, meant they were to thrown into dismay at the resulting draft Withdrawal Agreement of 28 February 2018, which in a special protocol on Ireland and Northern Ireland, stated:

*A common regulatory area comprising the [European] Union and the United Kingdom in respect of Northern Ireland is hereby established. The common regulatory area shall constitute an area without internal borders in which the free movement of goods is ensured and North-South cooperation protected in accordance with this Chapter ... The territory of Northern Ireland, excluding the territorial waters of the United Kingdom (the ‘territory of Northern Ireland’), shall be considered to be part of the customs territory of the [European] Union (European Commission Draft Withdrawal Agreement ...).*

Thus, from the British point of view there was an enormous difference between what had been agreed in the political deal in early December 2017 and the legal document into which it had been transformed in late February 2018. Indeed, Dagmar Schiek, a law professor at Queen’s University, Belfast described the CRA as ‘a new and unique legal solution that does not have any direct parallel in existing EU law’, one which extended the UK-EU areas of co-ordination far beyond the movement of goods (Schiek, 2018, pp. 5–7). Theresa May’s reaction was swift and unequivocal, telling the House of Commons on 28 February that: ‘The draft legal text ... would undermine the UK common market and threaten the constitutional integrity of the UK by creating a customs and regulatory border down the Irish Sea, and no UK prime minister could ever agree to it’ (*Brexit: The Draft Withdrawal Agreement ...* 2018, p. 68; Merrick, 2018, *Theresa May ...*). Others went much further, with former Brexit minister David Jones describing it as ‘an annexure of Northern Ireland by the European Union’ (Wearmouth, 2018). Moreover, within weeks the British prime minister

wrote to European Council president Donald Tusk stating that she had ‘made her position clear’ regarding Northern Ireland in that she was ‘committed to agreeing in the Withdrawal Agreement operational legal text for at least the so-called “backstop option” set out in the Joint Report in parallel discussion of these and other scenarios’ (D. Hughes, 2018). Just two days later, the Irish government attempted to exert further pressure on London by imposing a deadline of October that year for a withdrawal agreement including a deal on the Irish border (*Taoiseach Varadkar ...*). However, organizations highly critical of May’s Brexit and generally in favor of the backstop, such as the Institute for Government, were wary that it could end up being ‘a sustainable permanent solution’ allowing the EU to access the UK market while not returning the favor. In other words, the ‘the backstop could become a full stop’ (Durrant and Stojanovic, 2018, p. 10).

However, it was several months before the United Kingdom formally set out its position to the EU in a six-page document entitled the *Temporary Customs Arrangement* (TCA) published on 8 June 2018. While the British government once again expressed its preference for a future trade deal to sort out issues concerning the Irish border, it accepted that:

*In determining the future customs relationship with the EU, the UK has been clear on the need to protect the Belfast (Good Friday) Agreement in all its parts, including that there will be no hard border between Northern Ireland and Ireland, and no physical infrastructure or related checks and controls. This commitment was recalled by both the UK and EU in the December 2017 Joint Report, including the need to ensure that any solution protects Ireland’s place within the EU Internal Market and Customs Union, and preserves the integrity of the UK’s internal market and Northern Ireland’s place within it. Upholding these commitments requires a joint solution on both customs ... and an approach on regulatory standards, which will also need to be addressed ... While the UK believes that the Joint Report commitments with respect to Northern Ireland can be fulfilled through the overall UK-EU partnership, it is also necessary to ensure that there is an appropriate backstop solution for the Northern Ireland land border in the Northern Ireland protocol element of the Withdrawal Agreement, that would only come into force in limited circumstances (Technical Note ..., p. 1).*

Therefore, the backstop would only come into force if there was a gap between the end of the transition period and a future trade agreement (FTA) between the UK and the EU. More importantly, however, this new backstop would not only apply to Northern Ireland but to the whole of the United Kingdom, thereby avoiding the necessity of border controls either on its land border with the Republic of Ireland or at ports on the Irish Sea. Thus, British trade as a whole would not be subjected to ‘tariffs, quotas, rules of origin and customs processes including declarations on all UK-EU trade’ (ibid. p. 6).

Moreover, while London would continue to apply the EU’s common external tariff, it would be free ‘to negotiate, sign and ratify free trade agreements’ (FTAs) with rest of world

partners ...' Therefore, apart from proposing to deal with the 'continued regulatory alignment' for Northern Ireland required by the Joint Report through addressing an 'approach on regulatory standards,' the TCA introduced the condition of a time-limit being placed on the backstop:

*The UK is clear that the temporary customs arrangement, should it be needed, should be time limited, and that it will be only in place until the future customs arrangement can be introduced. The UK is clear that the future customs arrangement needs to deliver on the commitments made in relation to Northern Ireland. The UK expects the future arrangement to be in place by the end of December 2021 at the latest. There are a range of options for how a time limit could be delivered, which the UK will propose and discuss with the EU (ibid.).*

Michel Barnier's dismissive reaction came within hours, stating that the UK's proposals would be judged according to three questions, namely: whether it was a 'workable solution' in order to avoid a hard border; whether it respected the integrity of the single market and customs union; and whether it was, what he termed, an 'all-weather backstop'. Moreover, he immediately poured cold water on London's proposal extend to the backstop to cover the whole of the UK: 'Let me be clear: our backstop cannot be extended to the whole UK. Why? Because it has been designed for the specific situation of Northern Ireland.' Moreover, he continued to insist that placing the EU's customs union border down the middle of the Irish sea was a practical solution, saying: 'Checks carried out on ferries are less disruptive than along a 500km-long land border.' To make matters worse, Barnier then slapped down the UK proposal for a time-limit to the backstop to be set for December 2021: 'The temporary backstop is not in line with what we want or what Ireland and Northern Ireland want and need.' Finally, to rub salt in the wound, he declared 'Backstop means backstop,' thus mocking Mrs May's famous 'Brexit means Brexit' catchphrase (*Brexit: Michel Barnier ...*).

The Irish government's reaction, however, was not so high-handedly dismissive. While reiterating the importance of Barnier's three questions, Leo Varadkar did state that although the TCA had fallen short of expectations, it was 'a step in the right direction' and 'something with can work and negotiate around'. Seeming to undermine Barnier's claim to speak for all of Ireland regarding the backstop and future border arrangements, the Irish *Taoiseach* took a more conciliatory line:

*In fairness to the government in London they ... make it clear that this is only about the customs element of the backstop and we do have a difficulty with any sort of deadline ... The only deadline that should be in the backstop is the all-weather or if-and-when deadline. So, the backstop should apply until such a time as there is an alternative arrangement, a new EU-UK relationship which avoids a hard border' (Border plans ...).*



## The Chequers Plan and the Backstop

The following month, the British government published a White Paper outlining its plan for a deep and comprehensive relationship, a document which became known as ‘the Chequers Plan’ due to its being finalized at a meeting held at Chequers, the prime minister’s country residence, on 6 July 2018 (*The Future Relationship ...*). It purported to be based on the requirements as set out in the Joint Report, namely a two-year transition period following Britain’s leaving the EU on 29 March 2019, at the end of which the TCA would come into operation should a UK-EU trade deal not have been signed by then. Within days, however, serious disagreements over the plan led to the resignation of Theresa May’s Secretary of State for Brexit, David Davis, and her Foreign Secretary, Boris Johnson, both strong supporters of Brexit. In the House of Commons, however, Davis’s replacement, Dominic Raab, described it as:

*a principled and pragmatic plan for the relationship that we wish to build for the future ... [it] proposes a free trade area for goods to maintain frictionless trade, supported by a common rulebook and a new facilitated customs arrangement, but only for the rules that are necessary to provide frictionless trade at the border ... while enabling the UK to control its own tariffs to boost trade with the rest of the world (Dominic Raab ...).*

Unfortunately, the view in Brussels was rather different. As usual, Barnier more or less rejected the Chequers Plan out of hand within hours, claiming that excluding UK services from following EU rules could give a ‘significant competitive advantage’ to Britain and may contravene the EU’s own best interests. He also criticized the free circulation of certain goods, claiming that the EU had ‘a duty of care to protect consumers in the single market’, as well as the idea of delegating the collection of its own customs duties to a non-member state as perhaps not even being ‘legally feasible’. Barnier then contended that there would be ‘practical problems’ regarding the application of tariffs, along with a ‘major risk of fraud’ (Stone, 2018, *Brexit: EU chief ...*). Referring to an EU position paper, which ruled out ‘cherry-picking’ of elements of the union’s membership, the Frenchman did not hide the fact that he considered that the UK had crossed the EU’s red lines of maintaining the ‘four freedoms’, namely of goods, capital, services and labour: ‘There are some elements [of the white paper] which do seem to contradict the guidelines of the EU council, the heads of government and state, namely the indivisibility of the four freedoms and the integrity of the single market’ (Boffey & Rankin, 2018). *The Independent* sadly commented: ‘It has taken Theresa May two years to build her sandcastle. It took Michel Barnier, in his Brussels press conference, around eight minutes to kick it down’ (Peck, 2018).

Whatever about Barnier’s reaction, things were to get far worse in September when the British prime minister was ambushed by fellow EU leaders at a summit in Salzburg. As the summit was coming to a conclusion, and with May having conceded that Britain would be

unable to meet the October deadline to sort out the Irish border question, she first heard French president Emmanuel Macron accuse those who supported Brexit of being ‘liars’. Then Donald Tusk, who had met May privately moments before to discuss the possibility of a special summit in mid-November to finalize outstanding issues, suddenly turned around and declared to reporters that this would only happen if the prime minister had delivered on her commitment to find a ‘precise and clear’ solution to the Irish backstop by the end of October. Moreover, he gave a devastating assessment of the economic aspects of May’s latest plan which he bluntly stated ‘will not work’ and risked ‘undermining the single market’ before adding: ‘It must be clear that there are some issues where we are not ready to compromise and first of all this is our fundamental freedoms and single market and this is why we remain skeptical and critical when it comes to this part of the Chequers proposals.’ Daming it with faint praise, Macron then weighed in by adding: ‘It was a good and brave step by the prime minister. But we all agreed on this today, the proposals in their current state are not acceptable, especially on the economic side of it. The Chequers plan cannot be take it or leave it’ (Boffey & Sabbagh, 2018). To add insult to injury, Tusk then posted a mocking picture on Instagram of himself offering Theresa May some cake with the caption: ‘A piece of cake, perhaps? Sorry, no cherries’, a reference to the running joke in Brussels that Britain wanted to just ‘cherry-pick’ parts of the single market it liked, and thus ‘have its cake and eat it too’ (Stone, 2018, *EU council president ...*).

Understandably, May was livid at the manner in which both she and her proposals had been treated. On her return, she delivered a hastily arranged press conference at 10 Downing Street at which her anger was palpable. Standing in front of two Union Jacks, and with no European flag in sight, the prime minister first accused the EU of bad faith: ‘I have treated the EU with nothing but respect. The UK expects the same. A good relationship at the end of this process depends on it’, adding that ‘Yesterday, Donald Tusk said our proposals would undermine the single market. He didn’t explain how in any detail or make any counter-proposal. So, we are at an impasse’. May then went on to attack the EU’s backstop proposal that would see Northern Ireland remain inside the customs union if agreeing a free trade agreement with Brussels proved impossible: ‘It is something I will never agree to – indeed, in my judgment it is something no British prime minister would ever agree to. If the EU believe I will, they are making a fundamental mistake’ (Sabbagh & Boffey, 2018).

Despite such fighting talk, Britain’s conservative press remained unconvinced of May’s ability to see Brexit through. Writing in *The Spectator*, James Forsyth first criticized the EU for portraying itself as the champion of Ireland against its former colonial masters when, in his view, its own backstop constituted more of a danger to the GFA than Brexit itself. His greatest criticism, however, was aimed at Theresa May whom he accused of having being grossly incompetent at every stage of the negotiations, giving in to EU positions far too early over key issues such as finance and Northern Ireland while ‘in a post-election panic’ and allowing Brussels to draw out the process to its own advantage. Moreover, the prime minister had failed to direct her government to put its interpretation of what had been agreed into

writing, allowing to the EU produce its own legal definition. This revealed that the prime minister had ‘unwittingly given herself a choice: soften Brexit beyond all recognition or abandon Ulster.’ Now ‘embarrassingly exposed’ after Donald Tusk’s brutal rejection of the Chequers Plan, May’s position as a political hostage of the DUP had greatly limited what she could actually agree to. No deal would ‘hit Ireland as hard, if not harder than the United Kingdom’ and was in no-one’s interest, Forsyth contended. Despite this, he considered that the EU was not only deaf to pleas from the British government that a deal could be done on these terms but was simply unsympathetic to May’s predicament:

*Michel Barnier worked hard to back the Brits into this corner. Why let them escape now? The widespread belief in Brussels is that the UK will, in time, swallow whatever deal is offered — however unpalatable — because Mrs May has closed off all other options. It sees how the UK has backed down before in these talks. It sees how little serious no-deal planning has been done. It calculates that there is another climbdown coming. But this is a dangerous assumption. It overestimates Mrs May’s room for manoeuvre ... there could be a reasonable deal. But that would require both sides to realise what the other can and cannot accept ... The issue of the Irish border has made both the UK and the EU forget these truths. But if no deal is agreed, the outcome would be precisely what both sides say they do not want: a hard border in Ireland (Forsyth, 2018).*

### **The Withdrawal Agreement and Political Declaration of November 2018**

The impasse resulting from the rejection of the Chequers Plan lasted for almost two months until 14 November when May announced that her cabinet was supporting a draft UK-EU deal which included an agreement on the Irish backstop. This would see Northern Ireland remaining in alignment with some EU single-market rules should an alternative solution not be found by the end of the transition period in December 2020. More importantly, the whole of the United Kingdom would, for all practical purposes, remain in the customs union until the EU and UK agreed this was no longer necessary. This agreement was subsequently approved by EU leaders in Brussels on 25 November and comprised two parts, namely a ‘Withdrawal Agreement’ and a ‘Political Declaration’.

The Irish backstop was specifically dealt with in a protocol to the 585-page Withdrawal Agreement which stated that both parties would ‘use their best endeavours’ to conclude a future trade agreement six months before the end of the transition period in December 2020. However, if this proved not to be the case, the EU and the UK could ‘jointly extend the transition period’ for an unspecified period. Otherwise, the Irish backstop solution would come into force consisting of ‘a single customs territory between the Union and the United Kingdom’, which would apply from the end of the transition period ‘unless and until ... a subsequent agreement becomes applicable.’ However, some types of goods passing between

Northern Ireland and the rest of the UK would be subjected to extra non-customs checks. The mechanism for exiting the backstop, consisted of notifying the other party if 'either side considers the backstop is no longer necessary' and providing justification for this action. However, such a decision could not be unilateral as a joint committee would have to meet within six months, with both sides having to agree to end the backstop (*Agreement on the withdrawal ...*). The much shorter accompanying *Political Declaration* merely referred to Northern Ireland in two paragraphs setting out both parties' willingness to continue to implement the terms of the GFA and maintain the relationships which it had created, as well as promising to draw up a schedule to implement 'alternative arrangements for ensuring the absence of a hard border on the island of Ireland on a permanent footing' (*Political declaration ...*).

Anticipating that there would be Brexiteer resistance to the clause in the Withdrawal Agreement making Britain's exit from the European Union both seem indefinite and subject to the agreement of Brussels, Jean-Claude Juncker promised disappointment for anyone in Britain who thought Westminster's rejection of the deal would force the EU to offer improved terms. Some commentators felt that the EU should have made stronger efforts to ensure that Northern Ireland's already 'hybrid status' was expanded to make it fall both within the orbit of the EU and the UK, and awarding the right of its residents to claim EU citizenship, thus respecting rights to national identity already guaranteed under the GFA for those seeking Irish citizenship) (Schiek, *The Island of Ireland and Brexit ...*, 2018, p. 13; Gormely-Heenan and Aughey, 2017). In any case, Leo Varadkar contended that the deal allowed for an orderly withdrawal and was the 'next best outcome' to Britain staying in the EU (Campbell, 2018). However, such warnings or reassurances did not resolve the issue. May soon faced a backlash from MPs at Westminster, with several of her own ministers resigning in protest over the backstop, including her own Brexit secretary, Dominic Raab. Moreover, despite being lobbied by Northern Ireland's business and agri-food sectors to support May's deal, the DUP continued its opposition to any additional checks being placed on its trade due concerns that this could threaten the position of the province within the United Kingdom. In order to remind the prime minister of her dependence on the DUP's support for her minority government, its members then abstained on key budget votes as a warning to 'bin the backstop'.

However, it is important to keep in mind that differences over Brexit and the backstop had also paralyzed Jeremy Corbyn's Labor Party. Thus, while most Labor MPs and party members were strongly against leaving the European Union, with many supporting a second referendum, there was a sizable minority, mainly based in northern constituencies, which supported Britain leaving the EU. Matters were further complicated by the fact that many strongly left-wing figures in the Labor Party leadership, including Corbyn himself, had a long history of Euroscepticism, leading to accusations that they were 'secret Brexiteers' deliberately conducting a vague policy on Brexit in order to avoid party divisions (Savage, 2019; Kentish, 2018; O'Neill, 2016). It must also be remembered that Labor's lack of a clear

Brexit policy had allowed May to avoid trying to reach for a cross-party consensus in Parliament, an approach which she could easily justify by saying there was little or no common ground. Indeed, *Guardian* columnist Jonathan Freedland was not only highly critical of Labor having wasted the previous two and a half years indulging, accommodating and echoing the Brexiteers' 'fantasy' project of EU withdrawal until the last possible moment, but was withering in his assessment of Corbyn's 'alternative plan' for Brexit, one which the Labor leader had outlined in the same newspaper days earlier:

*It spoke repeatedly of Labour's 'alternative plan' for Brexit, by which Britain would have all the benefits of the single market – such as 'frictionless trade' – with none of the unwanted costs. This is a plan in the same sense that I 'plan' to win the men's singles title at Wimbledon next year. It is not a plan at all, but a desire for something that is demonstrably out of reach (Freedland, 2018).*

In early December 2018, suspicions on all sides of the debate that May was withholding information from both MPs and the public over Brexit led to Labor demanding that the government publish the legal advice it had received on the matter in full. Government resistance to do so led to the DUP supporting a parliamentary vote which found ministers in contempt of Parliament, thus forcing, in a humiliating manner, the publication of its legal advice on 5 December, six days before the prime minister was to put the Withdrawal Agreement up for approval by the House of Commons (Elgot, Syal & Stewart, 2018). Although much of this advice repeated what had already been known, it did concede that the backstop could end up placing Northern Ireland in a customs union with the EU indefinitely, thus allowing Brexit supporters to claim that their position had been vindicated. With the government now facing an overwhelming defeat in the upcoming vote on the Withdrawal Agreement, May made a last-minute decision to postpone it until she was more certain of victory (Merrick, 2018, *Brexit vote ...*).

With over 100 Conservative MPs now in open rebellion over the backstop clause, within two days a strongly pro-Brexit faction within the party, known as the European Research Group (ERG), now moved to have May ousted as leader. Led by Jacob Rees-Mogg, the ERG, having accused May of betraying the result of the 2016 referendum, triggered a vote of no confidence in May's leadership of the Conservative Party which took place on the evening of 12 December. Although the prime minister survived by winning 63% of the vote, a total of 117 of her own MPs had cast their ballot against her. Indeed, it was widely believed that the only reason she had avoided defeat was by promising to stand down as leader before the next election, scheduled for 2022. Notwithstanding her victory, May's position had been seriously weakened days before she was due to travel to a summit in an attempt to convince EU leaders to change the deal, even though they had already ruled this out (*Theresa May survives ...*).

By this stage, voices even in the left-leaning British press had become more critical of the prime minister's grasp of the issues at hand, especially the Irish backstop. Moreover,

academics also contended that a lack of understanding and resolution of ‘the Irish question’ by May’s government, and especially the ‘hybrid status’ of Northern Ireland, would not only impact on inter-community relations but on European integration as a whole (Schiek, *Brexit on the Island of Ireland ...* 2018, p. 368). On the positive side, *The Guardian* sympathized with the fact that she ‘is fighting on two fronts, against anti-EU fanatics who abhor every continuing post-Brexit tie with Europe, and against pro-EU remainers who see a chance of overturning the 2016 referendum’. Moreover, it not only accused the Conservatives of failing to understand ‘the Irish dimension of their doctrinaire political obsessions’ but that May herself had:

*ignored warnings that a post-election deal with the DUP – a party fundamentally out of step on Brexit with majority opinion in Northern Ireland and the Republic – would come back to haunt her. Not for the first time in British history the Tory party is again faced with a choice between protecting its narrow interests and what Sir Robert Peel, at the height of the Corn Law crisis, called the need to ‘understand this Irish case.’<sup>2</sup> Peel did. Mrs May doesn’t (Editorial, 2018).*

As a disastrous 2018 drew to a close, the British prime minister still maintained there were three options for the United Kingdom, namely: her Brexit deal; the so-called ‘Norway plus’ deal whereby the UK would stay in the single market and the customs union but would not have any say on EU rules, thus remaining outside the Common Agricultural Policy (CAP) and Common Fisheries Policy (CFP) and essentially becoming a non-voting member of the EU; or, finally, a second referendum, a solution which many agree would be extremely divisive and offer no guarantee of overturning the result. It would also be a dangerous thing for Remainers to wish for as if they lost a second referendum, it would result in a much harder Brexit. In addition, by running another vote, Parliament would be undermining its own legitimacy by claiming the right to decide that Brexit was not in the interests of the country. Despite this, it was still considered a possibility as neither May, who had been against Brexit during the 2016 referendum, nor Parliament wanted to end up with no deal.

Although some Remainers were supporters of the Norway plus option, it would not have stopped free movement of labor, a key plank of the prime minister’s election promise to control immigration, which, rightly or wrongly, had been a major issue in the Brexit debate. Indeed, by now Brexit had exposed how different the dominant view of the political elite in ‘the Westminster bubble’ and the mainly London-centered media was from the general British public, especially those living in the run-down former industrial heartlands of

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<sup>2</sup> Sir Robert Peel (1788–1850), British Prime Minister from 1841 to 1846 during which time his support of free trade led to the collapse of his government and split the Tory (Conservative) party over the issue of removing tariffs on corn imports, a move which was partly intended to relieve food shortages in Ireland during the Great Famine (1845–1849).

central and northern England. Feeling left behind and ignored for decades by both London and Brussels, such people had nurtured long memories of the glory days of the steelworks, shipyards and fishing ports. On the positive side, they were buoyed by the fact that the UK economy was not doing that badly when compared with the EU, and that, despite Brexit, Britain was politically stable, especially when compared with Macron's France then engulfed in the nationwide 'yellow vest' riots. Thus, the average Brexit voter could convince themselves that the EU was not the model of prosperity or stability that Britain had once emulated after the war. Although many within the Westminster bubble now accepted Brexit had terribly exposed both British democracy and the political incompetence of its leaders, they were more dismayed with the EU having carried on as if there was no fault on its part. Moreover, others went further in believing that Brussels was deliberately and openly punishing Britain for Brexit in an effort to discourage any other malcontent states from leaving the EU, or to quote Voltaire '*pour encourager les autres*'. Whereas the British political class had been flayed in a referendum and an election, Juncker and other EU leaders had lost Britain for the EU and not been punished for it. As political commentator Douglas Murray put it: 'Their reaction to us leaving has been, to my mind, the best demonstration of why we need to leave' (Murray, 2018).

Given the unexpected dominance of the Irish backstop issue throughout the year, many commentators came to the conclusion that, while it was not a contrived issue, its significance had been exaggerated as the obvious question now was if there could be frictionless trade across that border, then why not the rest of the UK. However, the election of 2017 resulting in a hung parliament, in which the DUP now held the balance of power, had made everything much more complicated regarding the Withdrawal Agreement (Murphy, 2018, pp. 32–33). Indeed, if anyone could be accused of wanting to have their cake and eat it too, it was the DUP which, although possessing a well-deserved reputation for being the most stubborn negotiators one could encounter, had often proved suddenly flexible if the price was right or if it suited their interests. Thus, for decades, under EU agriculture rules, Northern Ireland had been quite happy to be treated differently from the rest of the UK, especially during the ban on British beef exports during the 1990s. In fact, Ian Paisley, the notorious anti-Catholic and pro-Unionist founder of the DUP, was once supposed to have claimed that his constituents were British but his cows were Irish. Therefore, although it would have been possible to treat Northern Ireland differently, as it already shared a single energy and economic market with the Republic of Ireland, the DUP's holding the balance of power, despite Northern Ireland's own government having collapsed in January 2017, had changed the focus of the entire debate in Parliament (Carroll, 2018).

As we have seen, having been presented with the *fait accompli* of an Irish backstop, the British government had then attempted to turn the situation to its advantage by demanding a frictionless border not just for Northern Ireland but also its cross-channel trade, thus for the whole of the UK. However, as there was a fear in Downing Street that this would be seen as contradicting the referendum result, May placed these arguments behind the Irish border

question so as not to make them explicit, later drawing accusations that she was using the issue as a smokescreen. Therefore, during December 2018 and early January 2019, many, including seasoned observers, had failed to realize that there were now two backstops, namely the new UK-wide backstop and the original Northern Ireland backstop, the second of which would come into force if and when that covering all of the UK had expired. This meant that the proposed Irish border solution was now ‘a backstop to a backstop’.

### **The Backstop faces Parliament: January 2019**

It was no wonder, therefore, that confusion reigned over Christmas and New Year as Theresa May prepared to subject the Withdrawal Agreement to a ‘meaningful’ or binding vote on 15 January 2019. Admittedly, the chances of Parliament swallowing the backstop were very low, meaning that the current Withdrawal Agreement was far from securing majority support. Although the House of Commons was officially divided into political parties, it was, in reality, home to a number of political factions, including hardcore Brexiteers who would welcome a no-deal ‘crashout’ to hardcore Remainers hoping either for a second referendum or the cancellation of Brexit altogether. Thus, the result preferred by any of these factions would trigger the combined opposition of all of the others. It was apparent that for May’s deal to succeed there would have to be game-changing concessions from Brussels. Failing that, the prime minister could choose the highly risky strategy of running down the clock as close as possible to the Brexit deadline of 29 March and forcing MPs to choose between her deal or no deal.

In the traditional end-of-year summaries in the British media in late December, there was consternation on all sides of the political divide at the seriousness of the impasse in which the United Kingdom now found itself, due to the backstop. Peter Foster of *The Daily Telegraph* commented ‘When the history of Brexit is written, there will be long arguments over whether the “backstop” could have been avoided, but even before the Brexit vote, it was clear that Ireland was going to present a major impediment to the UK’s departure from the EU’ (Foster, 2018). Writing in *The Spectator*, James Kirkup labelled 2018 as ‘the year that exposed Brexit fantasies on all sides’, accusing the authors of these fantasies of running away when the reality became apparent. Top of the list was former Brexit secretary, David Davies, who had ‘scarpered’ by resigning once he realized months later that the December 2017 Joint Report he had helped negotiate now committed the United Kingdom to the Irish backstop. Moreover, Dominic Raab, who had only managed a few weeks as Davis’ successor, resigned ‘in horror at the revelation that securing a deal in a negotiation with a bigger interlocutor with less to lose from the failure of negotiations than Britain would, in fact, require Britain to make compromises.’ In line for particular criticism, however, was former foreign secretary, Boris Johnson, who resigned over the backstop in July 2018, namely ‘something he’d known about and assented to in December 2017’ while attempting to blame the prime minister and her advisers for making him feel, as Johnson himself had described at the time, ‘absolutely



reassured that this was just a form of words that was necessary to float the negotiations off the rocks'. However, Kirkup witheringly concluded the following:

*In other words, the then Foreign Secretary says he rested his understanding of an international agreement struck by the British Government not on the text itself, not on the legal or diplomatic advice of his officials, but on the assurance of a fellow politician (who was trying to sell him something). That none of that stuff mattered because something better and unspecified would turn up in due course that would mean we didn't, in fact, have to make compromises after all. I'll leave it to others to reach conclusions about what that account exposes about Mr Johnson's approach to governing (Kirkup, 2018).*

Voices also appeared in the Irish media critical of its government's handling of Brexit. Writing in *The Irish Times*, Ronan McCrea, Professor of Constitutional and European Law at University College London, described Ireland's strategy as a gamble based on the premise 'that the British authorities will either swallow the backstop or cancel Brexit altogether to avoid the chaos of a no-deal Brexit.' If this worked it would be seen as 'perhaps its greatest ever diplomatic success'; however, if it backfired, it would result in 'a hard economic border, economic chaos and poisoning of UK-Irish relations' (McCrea, 2019). In light of the Irish Government's position on the backstop possibly forcing the British to abandon Brexit altogether, this was made a legal possibility on 10 December by the European Court of Justice which ruled that the UK had the right to revoke its triggering of Article 50 of the Lisbon Treaty and remain a member of the EU without the permission of the union's other member states (Stone, 2018, *UK can cancel Brexit ...*). However, in legal terms, the UK could only revoke its intention to leave if it had unequivocally decided to stay in the EU, not merely to buy time until a final decision had been reached. Therefore, although it would be entirely legal for Parliament to overrule the result of the 2016 referendum, most accepted that it would need another referendum to make this politically justifiable. However, with no time left to organize such a referendum before the UK's exit date of 29 March, such a decision would require the agreement of all 27 EU members to grant the UK an extension to Brexit for it to be run. Thus, as 2018 moved into 2019, there were huge legal and political obstacles to Ireland achieving its goal of either having Britain accept the backstop or reject Brexit entirely. As McCrae concluded: 'Just because almost no one wants a no deal Brexit, does not mean that it will not come about ... The Irish Government has bet heavily on the idea that the UK will not self harm. Looking at the chaos in London, that may not have been a wise bet' (McCrea, 2019).

As the 'meaningful vote' on the Withdrawal Agreement drew closer, early January 2019 saw Brexiteers attempt to increase pressure on Theresa May in order to secure extra concessions over the backstop. With the DUP claiming to be alarmed, not reassured by signals from Brussels, it not only stated that it would not support May's Brexit deal, but that businesses in Northern Ireland should be relaxed about leaving the EU without an agreement. Indeed, the

DUP's Sammy Wilson told BBC radio that the backstop was a 'con-trick' and that 'If anyone should be worried about the tariffs on beef and sheep then it should be the Irish because of course, we, the United Kingdom are net importers of food.' With swathes of her own party and the DUP against her deal, the prime minister would now be dependent on the support of some of the Labor Party's 257 MPs for it to get through Parliament ('*DUP claims ...*).

In the face of such opposition from within her own ranks, May spent the first week of January conducting telephone diplomacy with EU leaders in order to secure legally binding guarantees which would satisfy the ERG and DUP. Although in public EU representatives were saying there would be no renegotiation, in order to increase the chances of the deal getting through they were prepared to quietly reiterate commitments stressing that the backstop would only be for a temporary period. However, political commentators were of the view that it could take May's deal being rejected by Parliament in order to ascertain more clearly what was required to get the deal through, and thereby extract more EU concessions. As an illustration of the uphill struggle the prime minister was now facing just within her own party, when one of her supporters defiantly stated 'If we have to have the vote 30 times, we will', a Conservative Brexiteer responded 'Without meaningful changes, we would vote against it 30 times' (Tapsfield, 2019, *Operation Fig Leaf ...*).

However, not all commentators from the conservative camp viewed the backstop *per se* as something inherently diabolical. James Kirkup, for example, attempted to convince Euroskeptics that there were 'Five reasons Brexiteers should learn to love the backstop.' Firstly, he pointed out that the expansion from a Northern Ireland-only to UK-wide backstop, a move strongly resisted by the EU, was a diplomatic victory for Britain. Secondly, this then had forced the EU to break its own rules regarding its much-vaunted 'four freedoms' and had allowed the UK to cherry-pick that allowing tariff-free movement of goods. Thirdly, the fact that the services sector, which comprised 80% of the UK economy, lay outside the backstop would give Britain the freedom to operate a global player in this regard. Moreover, even the constraints concerning state aid, environmental standards and labor rights, imposed to ensure a level playing field, were all things which the UK needed to comply with anyway and provided for a lot of domestic control. Fourthly, the backstop removed the right of EU countries to fish in Britain's territorial waters, thus returning £350m worth of British fish to British fleets, two-thirds of which would be sold to the EU anyway. Lastly, there was an exit clause for mainland Britain to leave the backstop should it wish to do so. Although the 'backstop to the backstop' would mean Northern Ireland would remain bound to EU trade rules, this would never have become such an important issue if Theresa May was not dependent on the DUP for her political survival. He thus concluded that:

*Contrary to what you might have heard, the backstop isn't a trap, a sinister contrivance by a malign and powerful EU plotting to capture Britain. It's the consequence of the compromises (domestic, diplomatic and economic) that are unavoidable in any serious international negotiation. The backstop is also like much else about Brexit: complicated,*

*technical and often quite boring. But it's also important. Too important to be debated using silly simplifications, terms like 'trap' and 'vassalage' and 'slave state'. In just a few days, MPs could be making decisions that will shape Britain's economy and place in the world for years or even decades. A lot of those MPs say the backstop is a big factor in their decisions. And a lot of the things said about the backstop have been, at best, mistaken and at worst deliberately misleading. We can only hope that MPs catch up with the facts about the backstop before we all run out of time (Kirkup, 2019).*

And time was certainly running out to the point where the prime minister was facing accusations of deliberately 'running down the clock.' Moreover, with May's 'meaningful vote' likely to fail, there were a variety of possible alternative outcomes, none of which could be predicted with any certainty, even by well-seasoned observers in politics and the media. These included: the prime minister pressing on with her plan and having Parliament vote on it again, following the securing of EU concessions on the backstop; the EU agreeing a 'technical' extension to the Brexit deadline of 29 March in order to allow enough time for a second parliamentary vote on the Withdrawal Agreement or, possibly, a second referendum; in the event of a heavy defeat, May abandoning her plan and seeking cross-party support for a more consensus-based Brexit, based on the Norway plus model; also in the event of a heavy defeat, May being forced to resign from office by her own ministers; a general election being called, following a vote of no confidence in the government by Parliament; the calling of a second referendum, which would need the support of the Labor Party, despite Jeremy Corbyn being unenthusiastic about the idea; and, finally, a no-deal scenario in which the UK would leave the EU automatically on 29 March, a solution which several MPs were seeking to make legally impossible through an amendment to a finance bill, despite Theresa May's insistence that the threat of no deal had to remain on the table in order to extract concessions from Brussels (Walker, 2019).

Less than a week before the meaningful vote was to take place, and just as the prime minister had commenced five days of negotiations with the EU, rebel Conservative MPs, led by Dominic Grieve, joined forces with Labor to inflict a parliamentary defeat on May's government, the second within a twenty-four-hour period. Although the prime minister had sought a period of 21 days to come up with revised plans, namely a Plan B, should the Withdrawal Agreement be rejected by Parliament, the House of Commons reduced this to just three working days. Widely seen as an effort by anti-Brexit Conservatives to help engineer the calling of a second referendum, this amendment provided the House of Commons with the opportunity to vote not only on May's deal but a range of possible alternatives. Despite the fact that it would not have the force of law, if a parliamentary majority could be found for one particular option, it would provide some indication of which solutions were politically viable ('*Brexit: Second Commons defeat ...*'). However, the Grieve amendment was controversial for another reason, namely the decision of John Bercow, the Speaker of the House of Commons, to take the unprecedented move of allowing the amendment to be attached

to the Commons motion restarting the parliamentary debate on the meaningful vote. Even though the Speaker was meant to be an impartial figure, Bercow, a known opponent of Brexit, defied the advice of his own clerks not to violate parliamentary procedures in order to facilitate the goals of those wishing to remain in the EU. While it was no surprise that furious Brexiteers viewed it as ‘constitutional sabotage’, even the liberal press accused Bercow of:

*floundering like, well, like some politician, being hopelessly exposed and utterly failing to cover it up ... Brexit is a game that could scarcely be controlled by any referee since long before it started. That the referee is now so clearly out of control too is a shocking, if unsurprising, development* (Peck, 2019).

Thus, the omens were not good during the final frantic days before the vote was to take place, with government ministers reduced to begging Conservative Party colleagues not to sabotage it. To make matters worse, Jeremy Corbyn announced that, should the deal fail to get through, he would table a vote of no confidence in the government, a move designed to trigger a general election and thus bring Labor to power. Stephen Barclay, the third Brexit secretary to hold office since the post had been created in July 2016, claimed that certain MPs were intending to vote down the deal with the aim of pushing through their own agendas regarding Britain’s plans to leave the EU. In addition, the DUP still maintained its position that it would not support May’s deal (*Brexit: Ministers plead with MPs ...*).

Thus, when the day finally arrived on 15 January, the question was not whether the prime minister would lose the meaningful vote but by how much. In fact, the result was nothing short of catastrophic, with May suffering the heaviest parliamentary defeat of a British prime minister in modern history by a majority of 230 votes. The spectacular backfiring of May’s decision to delay Parliament’s say on the issue meant that she had no choice but to face Labor’s vote of no confidence the following day (Stewart, 2019). However, as the Brexit debacle had so often proved, not even Labor, itself divided, was able to profit from the chaos of a government in disarray. With the DUP now deciding to keep her in office, May survived the motion of no confidence by 325 to 306 votes (*Brexit: May’s government survives ...*).

With Corbyn’s own plan to take power having backfired, he was now under pressure from forces within his own party to agree to supporting a second referendum, as well as from Theresa May to conduct cross-party talks in an effort to find a parliamentary consensus on Brexit. Instead, he took the opportunity in his response to the defeat of his no-confidence vote to make such talks conditional on the prime minister removing the possibility of Britain leaving the EU with no deal (Sabbagh, 2019). The Labor leader immediately faced unprecedented criticism for this decision from his own predecessor, Tony Blair, but, as someone well known for his past support for Palestinian and Irish republican groups, Corbyn was also mocked by Conservatives for having previously been willing to ‘sit down with terrorists’ without preconditions but not with the prime minister (Tapsfield, 2019, “*Of course, Corbyn ...*”).

The response in Brussels to May's predicament of facing a divided parliament with divided parties was to remain uncompromising. As the prime minister sought to secure concessions to the Irish backstop during the days which followed, EU leaders not only dismissed her request as 'party politics' but warned that they would not make even minor compromises until they had certainty of the Withdrawal Agreement getting through Parliament (Coates, Wright & Waterfield, 2019). With the House of Commons now in limbo, or possibly one of the seven circles of hell, moves were made by anti-Brexit MPs from across the party divide to make a no-deal scenario a legal impossibility. Labor MP Yvette Cooper and Conservative MP Nick Boles thus jointly proposed an amendment which would require Theresa May to postpone Britain's departure from the EU should a deal not be reached before 29 March. Although billed as 'the first time since the 17<sup>th</sup> century that the House of Commons has tried to take control of the nation's affairs from the government', it was unclear whether this amendment, which was one of fourteen possible amendments tabled for 29 January, had enough cross-party support to get through Parliament (Rentoul, 2019).

In the event, the Cooper-Boles amendment was defeated by 23 votes while, more significantly, one tabled by senior Conservative Party backbencher, Sir Graham Brady, calling for the government to renegotiate the Irish backstop, was passed. Not only had Parliament finally passed something giving the prime minister a clear mandate with which to go to back to the EU, it could no longer be denied, as Barnier had confidently claimed, that the backstop was a sideshow. Indeed, the voting down of the Withdrawal Agreement containing the backstop and the subsequent passing of the Brady amendment calling for its replacement with 'alternative arrangements' now showed that the backstop was the main problem.

Within minutes, however, of Parliament approving the replacement of the Irish backstop, a spokesman for Donald Tusk bluntly stated that: 'The backstop is part of the withdrawal agreement, and the withdrawal agreement is not open for re-negotiation.' The only thing Tusk was prepared to offer was an extension to Article 50 while warning that the EU would continue 'preparations for all outcomes, including a no-deal scenario.' Although these sentiments were quickly echoed by Jean-Claude Juncker and Emmanuel Macron, *The Guardian* reported that diplomats representing some EU member states in the Brexit negotiations were aware that 'informal discussions' were being held in the EU's corridors of power regarding the placement of a time limit on the backstop and its exit mechanisms. Worryingly for Dublin, one diplomat was quoted as saying that although any decision on the backstop would be Ireland's, other EU member states would be looking to Juncker and Tusk for guidance: 'At the end Ireland might need to think twice: do they want a definite problem on 30 March or do we want a possible problem in 2025? ... But then you hear [an] end date for a backstop is not enough for some Brexiters [sic] ... It is very difficult for member states to direct these things' Boffey & Rankin, 2019).

## Conclusions

In conclusion, the Irish backstop grew out Northern Ireland's very weak position in constitutional terms in shaping Brexit, with the relationship between the UK and the EU not being a matter devolved to the Northern Ireland legislature. Moreover, since January 2017, thus right in the middle of Brexit negotiations, the Northern Ireland Executive had ceased to function due to a political scandal leading to the collapse of the Assembly and the responsibility for governing the province reverting to Secretary of State for Northern Ireland (Murphy, 2018, p. 32; *Stormont crisis ...*). As we have seen, this perceived weakness in the status of Northern Ireland caused the Irish government to worry that the legal, political and economic frameworks already in place were not robust enough to survive Brexit. Not trusting the British to deliver on its political declarations guaranteeing the status quo for the Irish border, the Republic of Ireland, seeking in strength in numbers, approached Brussels to fight its corner in order to force the UK to sign up to a written agreement before Brexit was to take place. Moreover, as Mary C. Murphy has pointed out, the use of megaphone diplomacy and poor communication between the British and Irish governments had engendered tension over Northern Ireland at a time when friendly and constructive relations where sorely needed to establish stability (Murphy, 2018, p. 35). In addition, the subsequent gulf between the EU's interpretation of the ensuing Joint Report and Withdrawal Agreement as containing a legally binding backstop and the UK's belief that this constituted a political declaration concerning future arrangements led to a crisis of epic, even biblical proportions. This crisis then spread like a contagion from supra and inter-governmental level to parliaments, political parties, government institutions, the media, communities, and even friends and families, all seeing each other on either side of a Manichean divide. Indeed, as an issue that had virtually come from nowhere, the backstop engendered the greatest political and constitutional crisis facing the United Kingdom in living memory.

At the heart of this matter, therefore, lay 'the Brexit Paradox', namely that while virtually no-one in Britain or Ireland wanted a hard border, the Irish government's hard-line strategy of getting the EU to force its will on the British presented the possibility of making this more, not less likely, in significantly reducing the chances of any Withdrawal Agreement being passed by Parliament. Put simply, the backstop could not be said to exist without the approval of Parliament and no amount of wishful thinking from Dublin or Brussels could change that. There was a further irony in the fact that should the United Kingdom crash out with no deal, it would be Ireland, not Britain, that would be obliged by the European Union to establish the hard border it desperately sought to avoid. Moreover, the seemingly united position of Ireland and the EU on the backstop and the atmosphere of brinkmanship it engendered gave rise to a mood of defiance among some figures in the Conservative Party, one which had the potential to be counter-productive for Ireland. Indeed, when one British cabinet minister was asked if Ireland would erect a hard border in the case of no deal, he stated: 'If they want to put up a border, let them try' (Tapsfield, 2018). Therefore, for Brexiters,

the Irish backstop ‘has become a dirty word, handcuffing the UK to the EU’s customs union and taking away Britain’s chance to strike trade deals around the world for the foreseeable future’ (Foster, 2018). If this was not bad enough, the situation within Northern Ireland was potentially worse, with Brexit threatening to upset an already unstable political situation, as de Mars et al. warn:

*Most dangerously of all, however, Brexit stands to create winners and losers within Northern Ireland. Any changes in Northern Ireland’s constitutional status that tie it closer into Westminster’s orbit seem to affirm a Unionist vision of Northern Ireland’s place in the world. On the other hand, any recognition in the Brexit deal of a special place for Northern Ireland under aspects of EU law could be interpreted as having the opposite effect of bringing it into closer alignment with Dublin. No shared approach to governance can easily sustain winners and losers on such key issues (De Mars et al., 2018, p. 8).*

Thus, whatever position one takes in the Brexit debate, all may agree on one point, namely that that the period from June 2016 to January 2019 saw the running of perhaps the most inept, unfocused and chaotic set of negotiations in modern history in which none of the parties came anywhere near to achieving their goals and for which all of them must share the blame. To bowdlerize Churchill, never in the field of human diplomacy was so little achieved by so many over so long a period of time. However, if January 2019 saw Theresa May witnessing the catastrophic defeat of the Withdrawal Agreement in Parliament, the subsequent passing of the Brady Amendment calling for the replacement of the Irish backstop was to provide a glimmer of hope for her Brexit policy by providing a mandate to approach the EU for concessions and possible room for compromise within her own party. Indeed, the primary mission of Theresa May, or any subsequent British prime minister, would have to be to find a way around the Irish backstop, the most seriously underestimated issue in Brexit, one which had suddenly taken center stage and ultimately sabotaged the Withdrawal Agreement from within.

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